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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL., *Petitioners*

v.

ALABAMA BY-PRODUCTS COMPANY, ET AL.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S RESPONSE TO MEMORANDUM OF THE UNITED STATES

ROSCOE B. HOGAN
Counsel for Petitioners

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The petitioners submit this response: (1) To call this Court's attention to what is believed to be certain inconsistencies between the position of the United States in the memorandum submitted herein and in current enforcement activities under the Refuse Act of 1899, and; (2) To urge the full consideration of and adoption of the positions taken by the Environmental Defense Fund in the Motion For Leave to File a Brief as Amicus Curiae.

First: The United States, in brief, states that it agrees with petitioners that no impediment to navigation is required to make discharges without permits unlawful. Nonetheless, the lower Courts did hold to the contrary, and this will become the rule of the Fifth Circuit unless reversed here.

Second: Insofar as the decisions of the lower Courts do impose an "effect on navigation" test under the Refuse Act, this requirement must apply to both private actions and actions of the United States because Section 13 of the Refuse Act prohibits defined conduct and makes no distinction between what might be actionable by the United States and what might be actionable by private citizens.

Third: The United States cites *Connecticut Action Now, Inc. v. Roberts Plating Co.* (U.S.C.A. 2d 1972) 457 F. 2d 81 as holding that no private action will lie where navigational interests are not involved. The brief of the Environmental Defense Fund, footnote 6, p. 10, properly notes that this question was left open by the Second Circuit. We go further. That case was a qui tam action where the claimant sustained no direct damages. It is a "standing to sue" case and has nothing whatever to do with the claims in this case. Moreover, the discussion by that Court of *J. I. Case v. Borak* 377 U. S. 426 (1964) clearly recognizes the distinction between that case and this case.

Fourth: The *Federal Water Control Act of 1972*, 86 Stat. 816, does declare a moratorium on new Section 13 Refuse Act prosecutions. It does not apply to pending actions and does not repeal, but merely tolls, the application of the Act until December 31, 1974. It would require a seer to predict the future use of the Refuse Act, but the lower Courts' decisions in the petitioners' case are a present threat to the future use of the Act.

Fifth: Although the petitioners' counsel has not seen the application of the United States for certiorari in *U. S.*

v. Pennsylvania Industrial Chemical Co., #72-624, it would seem that the United States did not consider Section 13 of the Refuse Act of limited importance to an action in which it was a party.

Sixth: The recent history and avowed future interest of the United States was clearly stated by the Hon. Kent Frizzell, Assistant Attorney General of the United States for Land and Natural Resources in a speech at the Cumberland School of Law, Samford University on February 6, 1973 in which it was remarked that the United States contemplated continued action under Section 13 of the Refuse Act and furnished the following tables of activity by the United States under Section 13 of the Refuse Act:

(A) The United States has brought the following number of criminal actions under the Refuse Act of 1899:

Fiscal	1964-1969	43
Fiscal	1970	129
Fiscal	1971	191
Fiscal	1972	198
Fiscal	1973	Number not readily available

(B) The United States has brought the following number of civil actions under the Refuse Act of 1899, commencing on March 13, 1970:

Fiscal	1970	2
Fiscal	1971	55
Fiscal	1972	68
Fiscal	1973 to Feb. 8	24

Seventh: The brief of the Environmental Defense Fund raises considerations of the desirability of "citizen actions" in the enforcement of environmental statutes. The provisions of the Federal Water Pollution Control Act also recognize the desirability of citizen action. This case is,

however, more than a citizen's action to supplement Federal or State activities. This is an action by private citizens against law breakers to redress the wrong done directly to them.

We urge that the Petition for a Writ of Certiorari be granted.

Respectfully submitted.

ROSCOE B. HOGAN
Counsel for Petitioners

February 12, 1973